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No. 89-1148

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANICE EDMONSON DUTHU, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Social Security Administration may be estopped from enforcing its regulation requiring a written application for child insurance benefits because agency employees orally misinformed a claimant about her children's eligibility and declined to make a written record of her inquiry.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62a-78a) is reported at 886 F.2d 97. The opinion of the district court (Pet. App. 55a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1989. The petition for a writ of certiorari was filed on January 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Janice Edmonson Duthu claims that because of erroneous information she received from

employees of the Social Security Administration (SSA), she failed to file a written application for Social Security child's insurance benefits for her children, James Dugan II, and Kelly Dugan. Consequently, they lost approximately five years of benefit payments for which they otherwise would have been eligible. Under the Social Security Act, the filing of a formal application for child's insurance benefits is a prerequisite to receipt of such benefits. 42 U.S.C. 402(d)(1)(A) (1982 & Supp. V 1987). The application must be made in writing. 20 C.F.R. 404.610, 404.611. Because petitioners did not file a written application until December 1985, they cannot claim benefits for a period in excess of six months prior to that date *i.e.*, before May 1985. *See* 42 U.S.C. 402(j)(1)(B); 20 C.F.R. 404.603.

In an administrative proceeding, petitioners asserted that it was inequitable for the agency to deny benefits to the Dugan children beginning in March 1980, because on that date and several times thereafter, agency employees had erroneously informed Mrs. Duthu that her children were not eligible for such benefits. In addition, petitioners alleged that the employees had responded to Mrs. Duthu's requests that a written record be made of her inquiry by telling her that such an effort would be futile. Based on these assertions, petitioners claimed that the agency should be estopped from requiring compliance with the regulations requiring filing of a written application for benefits. The Appeals Council of the SSA rejected petitioners' claim for benefits for the period before May 1985.[1]

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[1] The agency granted benefits from that date to one of Mrs. Duthu's children, petitioner James Dugan II (Pet. App. 28a);

On review, the district court granted the Secretary's motion for summary judgment and upheld the agency's decision. Pet. App. 55a-61a. The court of appeals affirmed. Pet. App. 62a-78a. Relying on the established principle that the federal government may not be estopped on the same terms as other litigants, the court held that the erroneous oral statements by SSA employees and their declining to give Mrs. Duthu written confirmation of her visit did not constitute the type of affirmative misconduct that might permit estoppel of the government. Pet. App. 73a-78a.

ARGUMENT

The court of appeals correctly refused to estop the Secretary based on petitioners' allegations. Indeed, this Court has consistently refused to estop the government from enforcing the public laws.[2] This case fits easily within those decisions. Furthermore, because recent legislation has greatly reduced the like-

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it denied benefits to Mrs. Duthu's other child, petitioner Kelly Dugan, on the ground that Kelly did not meet statutory eligibility criteria even after May 1985. Pet. App. 27a.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982).

lihood that a claimant in petitioners' situation will in the future be left without a remedy, review by this Court is especially unwarranted in this case.

1. The government cannot be estopped from enforcing the law unless Congress has waived the sovereign immunity of the United States to permit the assertion of such a claim. In addition, estopping the government violates fundamental principles of separation of powers by requiring that misrepresentations by Executive Branch officials be given the force of law, thereby overriding specific statutory mandates enacted by Congress. As this Court observed in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), permitting the government to be estopped in circumstances similar to those present in this case would put it

> "at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement[,] which experience has taught to be essential to the honest and effective administration of the Social Security Laws."

Id. at 789-790 (quoting *Hansen* v. *Harris*, 619 F.2d 942, 956-957 (2d Cir. 1980) (Friendly, J., dissenting)). The violation of separation of powers principles would be especially severe where, as here, estopping the government would result in the expenditure of public funds contrary to express congressional mandate, as required by the Appropriations Clause. U.S. Const. Art. I, § 9, Cl. 7; see *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947). Finally, estopping the government disserves the public interest: it would fuel litigation characterized by problems of proof (a problem this case

exemplifies) and would expose the government with its millions of employees to an uncontrolled and potentially huge liability.

None of these obstacles to estopping the government is affected in the least by the degree of "misconduct" attributed to a government employee. Our arguments on these points are spelled out at greater length in our brief on the merits in a case presently pending before this Court, *Office of Personnel Management* v. *Richmond*, No. 88-1943 (argued Feb. 21, 1990).[3]

2. This case need not be held for the decision in *Richmond*, because even if the government could be estopped in certain cases, this would not be one of them. In *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), this Court held that erroneous oral statements by an SSA employee concerning an applicant's eligibility combined with the employee's failure to recommend the filing of a written application for benefits were insufficient to estop the SSA from denying retroactive benefits under 42 U.S.C. 402(g) (1982 & Supp. V 1987). See also *Heckler* v. *Community Health Services*, 467 U.S. 51, 64 (1984). Under *Schweiker* v. *Hansen*, *supra*, the decision below is plainly correct.

In this case, as in *Hansen*, a claimant was given misinformation about eligibility for benefits. Here, as there, no claim is made that the error was intentionally or malevolently made. And in this case, as in that, the error did not cause petitioners "to take action, or fail to take action, that [petitioners] could not correct at any time." *Hansen*, 450 U.S. at 789 (citations omitted).

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[3] A copy of our opening brief in the *Richmond* case has been provided to counsel.

Unlike in *Hansen*, Mrs. Duthu was given the same misinformation on three occasions. But the fact that one office was consistently mistaken about a point of law does not make the behavior of its employees qualitatively worse. As in *Hansen*, it is still the type of behavior that falls " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with the valid regulation." *Hansen*, 450 U.S. at 790.[4]

Petitioners also claim that SSA employees declined to make a written record of Mrs. Duthu's visits, telling her that such a record would be futile. Pet. App. 67a-69a. In fact, the Appeals Council of the SSA noted that written verification of petitioner's oral inquiries would not satisfy the agency's application requirement. Pet. App. 25a. Rather, only a written "statement, request, or notice" (20 C.F.R. 404.614), "indicating [an] intent to claim benefits"

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[4] Indeed, this Court has held that even highly blameworthy behavior—that which amounts to "an affirmative undertaking to waive or surrender a public right" (*United States* v. *Stewart*, 311 U.S. 60, 70 (1940))—is not sufficient to justify estopping the government. This Court has already identified conduct more egregious than that alleged in this case as behaviour that does not rise to the level of "affirmative misconduct." Compare *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (no affirmative misconduct where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (no affirmative misconduct where INS failed to act on visa petition for 18-month period, during which delay foreigner lost claim to permanent resident alien status); *Montana* v. *Kennedy*, 366 U.S. 308 (1961) (no affirmative misconduct where consular official erroneously advised petitioner's mother she could not travel to U.S. because of pregnancy, and petitioner consequently lost claim to American citizenship by birth).

and properly signed by the claimant (or, in this case, parent) would have sufficed (20 C.F.R. 404.630, 404.612). In any event, this behavior by SSA employees also falls "far short" of affirmative misconduct.[5]

3. This Court's review is also unwarranted because cases like the present one are unlikely to recur. Congress has recently enacted a statutory remedy for persons who fail to apply for benefits from SSA by reason of misinformation received from SSA employees. See Omnibus Budget Reconciliation Act (OBRA) of 1989, Pub. L. No. 101-239, § 10302(a), 103 Stat. 2481-2482. Section 10302(a) provides:

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[5] Petitioners assert that SSA employees "*prevented* [Mrs. Duthu] from filing an application." Pet. 34. We assume that petitioners refer to the SSA employees' declining to make a written record of Mrs. Duthu's inquiry since, in petitioners' view (which, as we have indicated, is mistaken), such a record would have been sufficient to constitute an "application" for benefits. See Question Presented, Pet. i.; Pet. App. 77a ("[T]here is no contention here that the SSA actually refused a specific request to make a written application.").

Even if petitioners' claim refers to more affirmative steps taken by SSA employees to discourage the filing of an application, that unidentified behavior fails to reach the level of "affirmative misconduct." In *INS* v. *Hibi*, *supra*, the Executive Branch removed the only authorized naturalization official from the Philippines for a significant period of time in which a law allowing certain foreign war veterans to become naturalized Americans under liberalized criteria was in effect. *Hibi*, 414 U.S. at 8-9. Thus, in order to apply for naturalization, an eligible Filippino would have had to leave his country to find a naturalization official. In the instant case, petitioners could have applied at any time simply by going to another SSA office or mailing in a statement. This Court ruled that the conduct in *Hibi* did not amount to affirmative misconduct; *a fortiori*, the conduct here cannot be so regarded.

> In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this Title by reason of misinformation provided to such individual by an officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of—
>
> (A) the date on which such misinformation was provided to such individual, or
>
> (B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor)
>
> [ ]Effective date.—The amendment made by paragraph (1) shall apply with respect to misinformation furnished after December 1982 and to benefits for months after December 1982.

Thus, under the statute as amended, a claimant who satisfies the substantive requirements for eligibility for benefits but who failed to make written application due to reliance on misinformation furnished by an officer or employee of the SSA may receive benefits notwithstanding that failure. Moreover, because this provision affects applicants who became eligible for benefits but relied on misinformation furnished on or after January 1, 1983, it provides retroactive relief for a substantive period of time. Congress thus has specifically addressed the question of recovery of benefits where there has been reliance upon misinformation furnished by agency employees.[6]

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[6] It is unclear whether petitioners claim they relied on misinformation furnished during the time period affected by Sec-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tion 10302(a) of OBRA of 1989. See Pet. App. 68a. However, if petitioners can demonstrate that they failed to file an application for benefits based upon misinformation that Mrs. Duthu received and relied upon after December 31, 1982, they will on proper application, and if otherwise eligible under the statute, be eligible to receive benefits from 1983 to May 1985.

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